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In The
Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,

Petitioner,

v.

SARAH PARKER PAULEY, DIRECTOR,
MISSOURI DEPARTMENT OF NATURAL RESOURCES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY AND GENERAL SYNOD OF THE UNITED CHURCH OF CHRIST AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI

The **Baptist Joint Committee for Religious Liberty** has vigorously supported religious liberty in the historic Baptist tradition for all of its eighty years. The BJC serves fifteen supporting organizations, including state and national Baptist conventions and conferences, and churches in Missouri and throughout the country. It addresses only religious liberty and church-state separation issues, and believes that strong enforcement of both Religion Clauses is essential to religious liberty for all Americans.[1]

In addition to supporting the free exercise protection offered by the First Amendment, the BJC has championed federal statutes, including the Religious Freedom Restoration Act of 1993, and state constitutions and statutes that protect religious liberty beyond what is required by the Free Exercise Clause.

Likewise, the BJC has steadfastly opposed the direct funding of houses of worship and other pervasively religious institutions on the grounds that such funding betrays the promise of the Establishment Clause. Similar to its support for many federal and state permissive accommodations of religion that go beyond what the Free Exercise Clause requires, the BJC supports Missouri's more explicit state constitutional no-aid provisions as a permissible policy to advance a historic

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[1] This brief was prepared entirely by amici. No other person made any financial contribution to its preparation or submission. Consents are on file with the Clerk.

and substantial religious liberty interest beyond what may be required by the Establishment Clause.

Amicus curiae **General Synod of the United Church of Christ** is the representative body of the national setting of the **United Church of Christ (UCC)**. The UCC was formed in 1957, by the union of the **Evangelical and Reformed Church** and **The General Council of the Congregational Christian Churches of the United States** in order to express more fully the oneness in Christ of the churches composing it, to make more effective their common witness in Christ, and to serve God's people in the world. The UCC has 5,000 churches in the United States, with a membership of approximately 944,000.

The General Synod of the UCC, various settings of the UCC, and its predecessor denominations, have a rich heritage of promoting religious freedom and tolerance. Believing that churches are strengthened, not weakened, by the principle of the separation of church and state, the UCC has long acknowledged its responsibility to protect the right of all to believe and worship voluntarily as conscience dictates, and to oppose efforts to have government at any level support or promote the views of one faith community more than another. At its twentieth gathering, the General Synod continued this legacy by encouraging the involvement of the United Church of Christ in a national campaign to promote the principle of the separation of church and state and the proper role of religion in society.

SUMMARY OF ARGUMENT

This Court has never held that the Establishment Clause would allow the direct funding of churches, much less that the Constitution *requires* it. From its first constitution in 1820, Missouri has prohibited state funding of churches. Similar provisions exist in thirty-nine other states, reflecting a commitment to religious freedom firmly rooted in history and experience. Indeed, special treatment of churches in our constitutional tradition, like the treatment of religion itself, is a means of protecting religious liberty, not a mark of hostility toward or discrimination against religion. It would profoundly upend our constitutional history, state and federal, to require Missouri to fund the improvement of church property.

Missouri's constitutional provision against funding churches, applied to its scrap tire program, is a legitimate bright-line rule that protects religious freedom. Tax support of churches was a primary mark of the religious establishments during the founding era and the target of colonial efforts by religious dissenters to disestablish religion from government. The hard-won battles to break free from the burden of tax support for churches were central to the development of the First Amendment and the American legal tradition of religious liberty. Churches remain the quintessential expressions of religious experience, recognized as having unique legal status and autonomy rights. It is

hardly a novel concept that the responsibility for maintaining and improving church property would rest with the church, not the state, and that states would avoid funding churches.

This Court has recognized the special dangers associated with direct funding of churches, as well as the necessity of safeguards to avoid government funding of religion in the context of other religious institutions. States, too, have long had an interest in promoting religious freedom by maintaining a separation between tax-supported endeavors and religion beyond what the Establishment Clause may require.

Missouri's constitutional no-aid provisions protect the independence and autonomy of religious institutions. The question before the Court in this case – whether it is constitutional for Missouri to operate a tax-supported program in a way designed to avoid historic and substantial anti-establishment concerns, consistent with its state constitution – was asked and answered in Chief Justice Rehnquist's majority opinion in *Locke v. Davey*. None of Petitioner's attempts to shrink the Court's decision in *Locke* are justified. Petitioner's effort to recast Missouri's constitutional prohibition on the funding of churches as a mark of constitutional suspicion, hostility, or discrimination should be rejected.

ARGUMENT

As the Court of Appeals correctly noted, Petitioner is a church that seeks an "unprecedented" ruling that the Federal Constitution not only permits, but *requires*, "the grant of public funds to a church." *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779, 783 (8th Cir. 2015). For many good reasons, this Court has never before had the occasion to consider a case involving a possible direct grant of monetary aid to a church.[2] In a variety of religious liberty cases, however, this Court has recognized the importance of avoiding government funding of religion, even in cases where aid to religious institutions has been upheld. In our constitutional tradition, restrictions on aid to religious institutions are never inherently suspect. On the contrary, in both federal and state law, such restrictions are widespread, long-standing, and effective means to protect crucial constitutional boundaries.

As Chief Justice Rehnquist explained with regard to a similar state constitutional provision in *Locke v. Davey*, "the United States and state constitutions embody distinct views – in favor of free exercise, but opposed to establishment." 540 U.S. 712, 721 (2004). That Missouri would establish a bright-line bar on direct funding of churches is "a product of these views, not evidence of hostility toward religion." *Id.* Missouri's categorical exclusion of churches in its scrap

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[2] In this brief, we extensively use the term "church" as representative of similar bodies organized for corporate worship.

tire program is firmly rooted in the state's constitutional law. It allows the state to avoid the risk of funding religion or policing the line between religious and nonreligious activity on church facilities. Neither equal protection nor free exercise requires the State to fund churches.

I. HISTORY, PRACTICE, AND PRECEDENT SUPPORT LEGAL PROHIBITIONS ON DIRECT GOVERNMENT FUNDING OF CHURCHES

Special treatment of churches in our constitutional tradition, like the special treatment of religion itself,[3] is a means of protecting religious liberty and the freedom and integrity of religious institutions, not a mark of hostility toward or discrimination against religion. It reflects a proper and historic understanding of the relationship between institutions of government and those of religion. Each has distinct funding sources, and each has primary roles and responsibilities that are best maintained through independence from one another.

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[3] Rejecting a claim that a church should be treated no differently than a labor union or social club, this Court recognized the special autonomy of churches as grounded in the First Amendment noting "the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012).

A. Tax support for churches was a central element of religious establishments and a principle impetus for the fight for religious liberty led by religious dissenters.

Breaking from their European heritage and colonial experience of government-established churches, America's Founders pursued a new vision of religious liberty that separated the institutions of religion and government. The First Amendment explicitly limited Congressional power in matters of religion: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. This separationist ideal that includes both elements of no establishment and guarantees for free exercise has also been a foundation of state constitutions, including Missouri's, intentionally seeking to protect religious liberty in ways that are distinct, and often more robust, than the First Amendment.

Leading legal scholars who have studied the establishment of religion in colonial America cite tax support of churches as a central element of religious establishments.[4] "First and foremost, [religious establishment] signified the financial support of recognized

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[4] *See* Ira C. Lupu and Robert Tuttle, *Secular Government Religious People* 5 (2014), "Through various kinds of religious establishments, governments declared and enforced orthodox beliefs, imposed taxes to support ministers and churches, and compelled attendance at worship." *See also* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part 1: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2131 (2003), finding six categories of establishment: "(1) control over doctrine,

ministers and their churches by the government. . . . But more than anything, a religious establishment meant an interdependency of sacred and profane institutions, whereby both the church and the state reinforced and legitimized each other." Ronald B. Flowers, Melissa Rogers, and Steven K. Green, *Religious Freedom and the Supreme Court* 15 (2008). This aspect of our country's history has long informed this Court's understanding of the proper meaning of the Religion Clauses as providing a separation between the institutions of religion and government in ways that have avoided advancement, entanglement, sponsorship, and hostility, while recognizing the important role of religious institutions. As this Court noted in upholding a permissive accommodation of a property tax exemption for churches, "for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, *financial support*, and active involvement of the sovereign in religious activity." *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 668 (1970) (emphasis added).

The historical fight for disestablishment, led by Baptists and other religious dissenters, is well documented. Far from discriminating against religion, disestablishment marked an essential step toward the

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governance, and personnel of the church; (2) compulsory church attendance; (3) financial support; (4) prohibitions on worship in dissenting churches; (5) use of church institutions for public functions; and (6) restriction of political participation to members of the established church."

protection of individual religious liberty. Disestablishment ensured that churches would not be funded through the coercive power of the state, but through the voluntary offerings of adherents, thus providing a constraint on government and a measure of religious liberty for individuals – to fund or refuse to fund religious institutions – that had long been denied.

When Virginia Baptist pastor John Leland recounted why Baptists so heartily supported the Revolution, he said it "suited their political principles, promised religious liberty, and a freedom from ministerial tax." John Leland, *The Virginia Chronicle* (1790) *reprinted in The Writings of the late Elder John Leland* 112 (Miss L.F. Greene ed., 1845). A leader of Massachusetts Baptists, Isaac Backus, complained of locales that were blending the ministerial tax into a general civil tax: "the civil charges of the town, and the ministers salary are all blended in one tax . . . so that our brethren who would readily pay their civil tax, yet cannot do it, without paying the ministers also!" Isaac Backus, *An Appeal to the Public for Religious Liberty against the Oppressions of the Present Day* (1773), http://classicliberal.tripod.com/misc/appeal.html. For colonial Baptists and other dissenters, government support for churches and clergy was a specific impetus in the fight for religious liberty.

In writing new state and federal constitutions, "evangelical dissenters insisted that these new constitutions address issues of religious liberty. Immediately in most states, eventually in all states, the established

churches were disestablished – deprived of government sponsorship and deprived of tax support. The details varied from state to state, but disestablishment was not the work of secular revolutionaries. It was mostly the work of evangelical religious dissenters." Douglas Laycock, *Church and State in the United States: Competing Conceptions and Historic Changes*, 13 Ind. J. Global Legal Stud. 503, 508 (2006).

James Madison wrote his "Memorial and Remonstrance Against Religious Assessments" to oppose Patrick Henry's bill that would have required Virginians to designate a portion of their civil tax for the support of clergy, "*or the providing places of divine worship*, and to none other use whatsoever." "A Bill Establishing a Provision for Teachers of the Christian Religion," *reprinted in* Flowers, *Religious Freedom and the Supreme Court* at 1130 (emphasis added). In the *Memorial*, Madison echoed many of the concerns of the religious dissenters, including "that it would coerce a form of religious devotion in violation of conscience,"[5] "that a true religion did not need the support of law,"[6] and that permitting religious institutions to compete with one another for scarce public resources would "destroy that moderation and harmony which the

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[5] *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 141 (2011)

[6] *Everson v. Bd. of Educ.*, 330 U.S. 1, 12 (1947).

forbearance of our laws to intermeddle with Religion, has produced amongst its several sects.'"[7]

"In Madison's view, government should not 'force a citizen to contribute three pence only of his property for the support of any one establishment'" – a principle that "does not depend on the amount of property conscripted for sectarian ends. Any such taking, even one amounting to 'three pence only,' violates conscience." *Winn*, 563 U.S. at 141 (quoting *Flast v. Cohen*, 392 U.S. 83, 103 (quoting 2 Writings of James Madison 183, 186 (G. Hunt ed. 1901))).

Madison's and the dissenters' objections carried the day: Henry's bill was defeated, and the Virginia General Assembly instead enacted Thomas Jefferson's "Bill for Establishing Religious Freedom," which in its very text repeated not only Madison's admonitions about protecting private conscience, but also his idea that state support for religion "tends also to corrupt the principles of that very religion it is meant to encourage, by bribing, with a monopoly of worldly honours and emoluments, those who will externally profess and conform to it."[8] The enacted Virginia bill

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[7] James Madison, *Memorial and Remonstrance* para. 11, quoted in *Everson*, 330 U.S. at 69 (Appendix to dissenting opinion of Rutledge, J.).

[8] "A Bill for Establishing Religious Freedom," *reprinted in* 2 Papers of Thomas Jefferson 546 (J. Boyd ed. 1950); *see also Everson*, 330 U.S. at 53 (Rutledge, J., dissenting) ("The great condition of religious liberty is that it be maintained free from sustenance, as also from other interferences, by the state. For when it comes to rest upon that secular foundation it vanishes with the resting.").

thus included a provision that became the template for so many state constitutional provisions, including Missouri's: "[N]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever." "A Bill for Establishing Religious Freedom," *reprinted in* 2 Papers of Thomas Jefferson 546 (J. Boyd ed. 1950); *see also Locke*, 540 U.S. at 722 n.6 (quoting this provision).

Professor Laycock has thus well summarized the fight over disestablishment: "The dominant issue in the founding-era debate over disestablishment was government financial support for churches. Churches that received tax support did not want to give it up; many citizens, and especially dissenters and the unchurched, did not want to pay the taxes. Defenders of the established churches proposed as a compromise that dissenters be allowed to pay their church tax to their own church, so that tax money would be equally available to all denominations. But in the end, every state rejected this compromise. The high profile debate over tax support for churches has played a large role in the development of American understandings of religious liberty." Laycock, *Church and State* 13 Ind. J. Global Legal Stud. at 508.

Whatever disputes exist about the historical meaning of no establishment, there is little question that avoiding tax support for churches was a central concern of the Founding era. Whether modern Establishment Clause jurisprudence *might* allow a state to include a church in a particular secular grant program with appropriate safeguards to prevent government

funding of religious activity, it is not surprising that Missouri or any other state would, as a matter of state policy, choose not to fund churches.

B. Churches are quintessential religious entities accorded special legal status to protect their autonomy and religious liberty.

The unique place that churches occupy in law is not simply a relic of history. Their legal status reflects their distinctive nature. The primary purpose of identifying as a church is to claim a religious identity and purpose, and to engage in religious activities with others.

Churches are the historic and typical vehicle for communal religious activities, including assembling for worship, religious education, and proselytization. Every week, millions of Americans voluntarily attend a house of worship, funded with the tithes and offerings of voluntary adherents of the faith. The manner in which a church expresses itself through doctrine, tradition, practice, use of its facilities, and involvement in activities that benefit those outside the faith community, varies widely.[9] These differences reflect our

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[9] Declining to tie a church's tax exemption to the extent it serves the larger community, this Court described this diversity in church practices in *Walz*, 397 U.S. at 674: "Churches vary substantially in the scope of such services. . . . The extent of social services may vary, depending on whether the church serves an urban or rural, a rich or poor constituency. To give emphasis to so variable an aspect of the work of religious bodies would introduce

country's religious liberty and diversity and the autonomy provided to churches by the Religion Clauses.[10]

Church-owned and operated facilities are not readily segregated between religious use and secular use devoid of religious import.[11] It is common for

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an element of governmental evaluation and standards as to the worth of particular social welfare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize."

[10] This Court recently affirmed the broad autonomy of churches to include a "ministerial exception" to most employment laws in *Hosanna-Tabor*. The Court stated, "Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers." *Hosanna-Tabor*, 132 S. Ct. at 702. This deference to churches was not to protect invidious discrimination but to recognize the full legal freedom in employment of ministers as central to the faith and mission of the church itself. *Id.* at 707.

[11] Church facilities are in fact recognized in federal law as deserving of special treatment. In describing the need for the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-5 (2012), the joint statement of Senator Orrin Hatch and Senator Edward Kennedy asserted, "The right to assemble for worship is at the very core of the free exercise of religion. Churches and synagogues cannot function without a physical space adequate to their needs and consistent with their theological requirements. The right to build, buy, or rent such a space is an indispensable adjunct of the core First Amendment right to assemble for religious purposes." 146 Cong. Rec. S7774 (daily ed., July 27, 2000) (joint statement Sen. Hatch and Sen. Kennedy). Additionally, Congress had previously enhanced the penalties for vandalizing or destroying religious real property in the Church Arson Prevention Act of 1996. 18 U.S.C. § 247 (2012). In 2011, a Texas man pled guilty to charges pursuant to this act for "setting fire to a playground outside of a mosque." "Texas Man Pleads Guilty in Arson of Mosque Playground" *Religious Freedom*

churches to have facilities dedicated to the care and education of children to facilitate worship for their parents. It is also common that such facilities are used as additional ministry opportunities beyond Sunday services. The extent to which such a church ministry is funded from the church offerings or through tuition payments that may produce income for other church activities and the extent to which the ministry is explicitly religious is a matter of church autonomy.

In this case, Petitioner is a church that uses its facilities to operate a ministry for the children of church members, as well as other children in the community, to teach a Christian worldview and spread the Gospel of Jesus Christ. *See* Complaint ¶¶ 14-17. As the district court held, "religious instruction is a central element of the preschool and daycare offered through the Learning Center, and there is nothing in the Complaint to suggest that this instruction does not extend to the playground." *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 976 F. Supp. 2d 1137, 1150 (W.D. Mo. 2013). It would be difficult, if not impossible, to provide government funding for church property with adequate safeguards to insulate that aid from religious use.

Petitioner argues it should be eligible for a grant because the State's program is secular and because the aid is for material that cannot be diverted to religious

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in Focus 45 U.S. Dep't of Just. C.R. Div. (2011), https://www.justice.gov/crt/religious-freedom-focus-volume-45#4.

use. While it is true that scrap material is not inherently religious, that fact does not defeat the State's interest or otherwise control the outcome of this case. Many secular objects, such as bread, wine, and water, take on religious significance in the context of a church. Under Petitioner's theory, however, there would not even be an Establishment Clause question if a state decided to fund construction of houses of worship, because building materials are not inherently religious. The issue is not whether the recycled rubber replacement material is inherently religious, but whether Missouri must fund an upgrade to a church playground, with the accompanying federal constitutional responsibility to provide safeguards against state funding of religion.[12]

This Court in *Amos* recognized the threat to church autonomy posed by judicial attempts to distinguish a church's religious from its secular activities. "[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission." *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 336 (1987). For that reason, the

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[12] *See infra* Section I.C.

Amos court upheld the exemption for religious employers from Title VII's religious discrimination provision, and rejected a plea to constitutionally require a narrower, job-by-job analysis in place of that bright-line exemption. *Id.* at 344 ("A case-by-case analysis for all activities . . . would both produce excessive government entanglement with religion and create the danger of chilling religious activity.") (Brennan, J., concurring).

Here, the same reasoning applies and is even more compelling. The religious employer in *Amos* was a gymnasium with a religious affiliation. Trinity Lutheran is a house of worship, the quintessential pervasively religious institution. If a case-by-case analysis of a religiously affiliated gymnasium produces excessive government entanglement, then surely such scrutiny of houses of worship raises even greater establishment concerns. Distinguishing a church's religious facilities from its non-religious facilities to determine their eligibility for taxpayer funds entangles state funding agencies inappropriately in religious matters, and compromises a church's autonomy. Given those dangers to religious liberty, Missouri should not be faulted for implementing a bright-line rule that ensures complete financial separation. The grant program, if applied to Petitioner, would pay for improvements to church property used to advance the church's ministry. Surely the State is not required to provide such funding.

C. This Court's Establishment Clause jurisprudence recognizes the unique status of churches and the special dangers associated with government funding of churches.

This Court has never upheld a direct grant to churches, much less *required* the State to provide such funding. The Eighth Circuit was far too quick to assume that Missouri's scrap tire grant program, if extended to churches, would satisfy the Federal Establishment Clause. In the Court's most recent case involving direct aid to religious institutions, *Mitchell v. Helms*, 530 U.S. 793 (2000), Justice O'Connor's controlling opinion warns of "the special dangers associated with direct money grants to religious institutions." *Id.* at 855 (O'Connor, J., joined by Breyer, J., concurring) (upholding program of in-kind aid to religious schools, among others, because it contained constitutionally adequate safeguards against diversion to religious use).[13] Direct money grants, she notes, is a "form of aid [that] falls precariously close to the original object of the Establishment Clause's prohibition." *Id.* at 856. *See also Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 842, 844 (1995) ("we have recognized special Establishment Clause dangers where the government makes direct money payments to sectarian

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[13] Because no opinion in *Mitchell* commanded a majority, the concurring opinion of Justices O'Connor and Breyer is controlling, because it is the narrowest opinion in support of the Court's results. *Marks v. United States*, 430 U.S. 188, 193 (1977). *Mitchell* involved provision of in-kind aid to schools, including religiously affiliated schools, *not* funding for houses of worship.

institutions. . . . It is, of course, true that if the State pays a church's bills it is subsidizing it, and we must guard against this abuse.").

This Court has treated churches, and other pervasively religious entities, with special sensitivity. Whether constitutionally mandated or simply permissive, such treatment aligns with the free exercise and no establishment values embodied in the First Amendment. Religious institutions, and churches in particular, have long been recognized as vehicles for religious expression and practice with autonomy interests protected by the Religion Clauses. These entities receive legal advantages, such as exemptions from certain employment laws to facilitate free exercise, to protect against government interference with religious practice. Likewise, religious institutions may be subject to exclusions from government funding, in part because religion so pervades their purpose and functions that any government aid risks government financing of religious experience.[14]

Importantly, the Establishment Clause concern that lurks in this case is unlike that in one involving indirect financing by "vouchers," where the Court may find the funding of religious institutions is permissible only as a result of genuinely independent private choice, *see Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *see also Locke*, 540 U.S. at 719 (explaining that,

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[14] That the plurality opinion in *Mitchell v. Helms* raised questions about the "pervasively sectarian entities" category should not interfere with the scope of state discretion to steer clear of aiding houses of worship, the prototypical sectarian entity.

for this reason, the scholarship program at issue there would not violate the Establishment Clause). Likewise, this case does not involve a question of access to a speech forum open to a wide array of viewpoints. *See Rosenberger*, 515 U.S. 819; *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Widmar v. Vincent*, 454 U.S. 263 (1981) (requiring equal treatment); *Locke*, 540 U.S. at 720 n.3 (challenged funding program "is not a forum for speech"). Similarly, this Court's decisions allowing aid to religious institutions in other contexts, such as social services, do not undercut the state's interest of not funding religious activities or certain religious institutions that do not separate their religious and secular activities. *See Bowen v. Kendrick*, 487 U.S. 589, 621 (1988) (remanding case involving funding of social services provided by religious organizations to ensure no aid to pervasively sectarian entities or distinctively religious activities).

Nor does the aid in question resemble police and fire protection, which is not only *not* a form of direct *monetary* aid, but is also an entitlement for *everyone* in the community. *See Everson*, 330 U.S. at 17-18. Here, Missouri state administrators, not private parties, make decisions about the provision of *cash subsidies* to a select and very limited group of recipients – only fourteen entities in the year in question, out of the forty-four that applied. In this regard, the instant case is even stronger for the state than in *Locke*, where the state excluded students majoring in devotional theology from the Promise Scholarship Program, which was available to every student who otherwise met the

grade and income requirements. The program was not a lottery to which qualifying students would apply and hope to win a scholarship. Missouri's narrow incentive program for a small number of recipients reflects its funding priorities and is consistent with its long-standing religious liberty policy. Because the Missouri program is highly limited and discretionary, the state's constitutional defense of it is even easier than was the case in *Locke*.

This Court need not and should not opine on whether and under what rare circumstances and conditions the Establishment Clause might allow a state to convey funds directly to a church. Even assuming arguendo that this grant program satisfied the Establishment Clause, Missouri does not violate the Constitution by implementing its own reasonable, bright-line rule, incorporated in three long-standing provisions of the Missouri Constitution – likewise found in the constitutions of most of the states in the Union – that the state may not make direct payments to a church. If the Court holds that Missouri *may* continue to implement this categorical, bright-line rule, there will be no need to decide what safeguards are necessary to satisfy the Establishment Clause.

II. MISSOURI'S CONSTITUTIONAL PROHIBITION ON DIRECT FUNDING OF CHURCHES PROTECTS RELIGIOUS LIBERTY AND CANNOT BE DISMISSED AS RELIGIOUS STATUS DISCRIMINATION

Missouri's bright-line rule prohibiting the direct funding of churches is well-founded and within the State's discretion to separate the institutions of government and religion beyond what the Establishment Clause requires.

A. Federalism allows states to maintain an independence of religion and government beyond what the Establishment Clause requires.

In our federalist system, federal and state laws sometimes provide overlapping protections. While states cannot offer less protection than the federal government, they can, and often do, offer greater protection. *See, e.g.*, *State v. Schmid*, 423 A.2d 615, 626 (N.J. 1980) (noting that the New Jersey state constitutional free speech and assembly protections are "more sweeping in scope than the language of the First Amendment"; *People v. Scott*, 593 N.E.2d 1328, 1334 (N.Y. 1992) ("We believe that under the law of this State the citizens are entitled to more protection [than the Fourth Amendment provides]."); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948-49 (Mass. 2003) ("The Massachusetts Constitution is, if anything, more protective of individual liberty and equality than the Federal Constitution; it may demand broader protection

for fundamental rights; and it is less tolerant of government intrusion into the protected spheres of private life.").

As Chief Justice Rehnquist's majority opinion in *Locke* demonstrates, that understanding of constitutional protections – as a floor beneath and not a ceiling above constitutional concerns – applies with full force in the Establishment Clause context. *See Locke*, 540 U.S. at 722 ("the differently worded Washington Constitution draws a more stringent line than that drawn by the United States Constitution."). The desire to avoid establishment, the Court reasoned, is a "historic and substantial state interest." *Id.* at 721. Because the Establishment Clause is restrained by the Free Exercise Clause, and vice versa, potential expansion of each above the floor of federal rights is inherently and uniquely limited. The "pairing presents a constitutional strategy that appears nowhere else in the Bill of Rights. . . . [They] create both a floor under and a ceiling over the formulation of religion policy by the states." Ira C. Lupu and Robert Tuttle, *Federalism and Faith*, 56 Emory L.J. 19, 21-22 (2006).

This Court has recognized that there is room for state policy between what the Establishment Clause prohibits and the Free Exercise Clause demands. *Walz*, 397 U.S. at 669. Though certainly not without limits, this "play in the joints" allows states to pursue religious liberty interests beyond what is required by the First Amendment. *Id.* Otherwise, every state decision touching religious institutions would raise a controlling federal constitutional question. Just as there is a

zone of permissive accommodation that the government may respect beyond what the Free Exercise Clause requires, there is a zone of permissive separation to maintain the independence of religion and government beyond what the Establishment Clause requires.

By affording state and local governments the latitude to resolve church-state issues between the Religion Clauses, "federal courts achieve some of the desirable effects of originalism – namely political accountability and judicial consistency." Jesse R. Merriam, *Finding a Ceiling in a Circular Room:* Locke v. Davey, *Religious Neutrality, and Federalism*, 16 Temp. Pol. & C.R. L. Rev. 103, 129 (2007). Refusing states this latitude on borderline church-state issues would collapse the "play in the joints" between the Religion Clauses this Court has wisely and repeatedly recognized. *Locke*, 540 U.S. at 718 (quoting *Walz*, 397 U.S. at 669).

B. Missouri's historic and consistent policy is well founded and cannot be dismissed as religious status discrimination.

Missouri's distinct legal treatment of churches provides no basis for constitutional suspicion or charges of religious animus. Missouri and more than half of the states have long-standing constitutional provisions that recognize the unique nature of religious institutions, protect against state funding of religious experience, and explicitly prohibit the funding

of churches. Petitioner's claim that the Constitution requires direct funding of church facilities would upend church-state law and could have far-reaching negative consequences for religious liberty.

Long before U.S. Senator James Blaine introduced his constitutional amendment to prohibit government funding of sectarian schools in order to support public education, the question of taxes collected by the government being given directly to churches had been settled. "[T]here were widespread objections to tax support for churches. . . . This opposition forced the Framers' generation to think about the tax issue. Once they thought about it, they concluded that any form of tax support for churches violated religious liberty." Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim about Original Intent*, 27 Wm. & Mary L. Rev. 875, 917 (1986).

Whatever disputes exist about the historical meaning of no establishment, there is little question that avoiding tax support for churches was a central concern of the Founding era. Whether modern Establishment Clause jurisprudence *might* allow a state to include a church in a secular in-kind grant program with appropriate safeguards to prevent government funding of religion,[15] it is not surprising that Missouri or any other state would choose not to fund churches.

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[15] *See supra* Section I.C. discussing *Mitchell v. Helms*.

Missouri's constitutional history provides strong support for the "no-aid" principle as an essential religious liberty protection. It is utterly ahistorical and anti-originalist to re-frame that principle as harmful or hostile to religion. The state constitution includes three provisions that categorically prohibit the State from providing money to churches directly: article I, sections 6 and 7, and article IX, section 8.[16] These constitutional provisions have a long and distinguished history, spanning almost two centuries and several different iterations of the state constitution.[17] They are

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[16] Mo. Const. art. I, § 6: "That no person can be compelled to erect, support or attend any place or system of worship, or to maintain or support any priest, minister, preacher or teacher of any sect, church, creed or denomination of religion; but if any person shall voluntarily make a contract for any such object, he shall be held to the performance of the same." Mo. Const. art. I, § 7: "That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship." Mo. Const. art. IX, § 8: "Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever."

[17] All four Missouri constitutions have had one or more no-aid provisions. Once introduced, the provisions remained in each

consistent with similar categorical prohibitions in the constitutions of at least thirty-nine of the fifty states of the Union.[18] These bright-line, prophylactic rules

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successive constitution without material change. Article I, section six's "no compel" provision was first introduced as article XIII, section 4 of the 1820 constitution. 4 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America* 2163, 2192, 2230 (Francis Newton Thorpe ed., 1909) (hereinafter "Thorpe"). Article IX, section 8 first appeared in a series of amendments to the 1865 constitution which were ratified on November 8, 1870. 4 Thorpe at 2228, 2264. This provision strengthened Missouri's no-aid commitment by specifying that state and local government bodies would not "make any appropriation, or pay, from any public fund whatever, anything in aid of any creed, church, or sectarian purpose." *Id.* at 2228. Article I, section 7 first appeared as article II, section 7 of the 1875 constitution specifying that public funds will not be paid directly or indirectly to "any church, sect, or denomination of religion." 4 Thorpe at 2230.

[18] Thirty-nine states have one or more constitutional provisions effectively prohibiting direct payments to churches. Thirteen states, including Missouri, have *both* a provision providing that "no man shall be compelled to support a church," or words to that effect, *and* one or more provisions saying "no money shall be spent on churches," or words to that effect: Colorado, Idaho, Illinois, Indiana, Michigan, Minnesota, Missouri, New Mexico, Pennsylvania, South Dakota, Texas, Virginia, and Wisconsin. Fourteen states have only the former "no man compelled" but not the latter: Alabama, Arkansas, Connecticut, Delaware, Iowa, Kentucky, Maryland, Nebraska, New Jersey, Ohio, Rhode Island, Tennessee, Vermont, and West Virginia. Twelve states have only the latter ("no funds"), but not the former: Arizona, California, Florida, Georgia, Massachusetts, Montana, New Hampshire, Oklahoma, Oregon, Utah, Washington, and Wyoming. *See* Appendix for the text of each of these constitutional provisions. Eleven states have no such provision regarding financial support for churches or places of worship: Alaska, Hawaii, Kansas, Louisiana, Maine, Mississippi,

reflect fundamental concerns – about protecting taxpayer conscience, preserving church autonomy, and avoiding religious conflict in the legislative and administrative process – that animated Madison's *Memorial and Remonstrance*, the 1779 enactment of the Virginia "Bill for Establishing Religious Freedom," and the Establishment Clause of the Federal Constitution, which Madison himself drafted. A decision by this Court requiring Missouri to directly fund churches, despite its long constitutional tradition to the contrary, would unsettle the state constitutional law of every state that has a comparable funding prohibition.

When Missouri entered the union as a state, in 1821, its first constitution provided that "no man can be compelled to erect, support or attend any place of worship, or to maintain any minister of the gospel, or teacher of religion."[19] By including this provision,

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Nevada, New York, North Carolina, North Dakota, and South Carolina.

[19] Mo. Const. of 1820 art. XIII, § 4, quoted in 4 Thorpe 2163. The provision read in full: "That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no man can be compelled to erect, support or attend any place of worship, or to maintain any minister of the gospel or teacher of religion; that no human authority can control or interfere with the rights of conscience; that no person can ever be hurt, molested or restrained in his religious professions or sentiments, if he do not disturb others in their religious worship." Congress required Missouri to make an amendment to its 1820 Constitution as a condition of entry into the union, *id.* at 2148-49, but did not insist upon any such change to the religion clauses.

Missouri was not breaking new ground. A similar prohibition appeared in Virginia's landmark "Bill for Establishing Religious Freedom" in 1779, and at least thirteen of the twenty-three states that preceded Missouri into the Union included such a prohibition in their constitutions.[20] This provision, guaranteeing that no one will be compelled to support *any place of worship*, has been a part of Missouri's Constitution ever since, without material change; it appears today as article I, section 6.

From its first articulation of its own no establishment interests, Missouri protected the religious liberty of its citizens by refusing to fund both church buildings (erect or support) and church leaders or teachers (maintain). Through each successive iteration approved by Missourians, the state constitution maintained its prohibition against funding churches including in the current version, enacted in 1945, with three reinforcing no-aid provisions.

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[20] *See* Ala. Const. of 1819, art. I, § 3, quoted in 1 Thorpe at 97; Conn. Const. of 1818, art. VII, § 1, quoted in 1 Thorpe at 544-45; Del. Const. of 1792, art. I, § 1, quoted in 1 Thorpe at 568; Ga. Const. of 1798, art. IV, § 10, quoted in 2 Thorpe at 800-01; Ill. Const. of 1818, art. VIII, sec. 3, quoted in 2 Thorpe at 981; Ind. Const. of 1816, art. I, § 3, quoted in 2 Thorpe at 1058; Ky. Const. of 1792, art. XII, § 3, quoted in 3 Thorpe at 1274; N.J. Const. of 1776, art. XVIII, quoted in 5 Thorpe at 2597; N.C. Const. of 1776, art. XXXIV, quoted in 5 Thorpe at 2793; Ohio Const. of 1802, art. VIII, § 3, quoted in 5 Thorpe at 2910; Pa. Const. of 1776, art. II, quoted in 5 Thorpe at 3082; Tenn. Const. of 1796, art. XI, § 3, quoted in 6 Thorpe at 3422; Vt. Const. of 1793, ch. I, art. III, quoted in 6 Thorpe at 3762.

Missouri state courts have consistently interpreted these no-aid clauses together as a series of constitutional provisions designed to advance "the principle which is of the warp and woof of democracy, namely, [that] the people must enjoy religious freedom and religious equality," a principle that "has stood out as a guiding star in the growth and development of our form of government and has contributed to its solidarity. . . . Because of it, devotion to religious beliefs according to the dictates only of one's conscience without molestation or forcible direction became possible, thus permitting an unhampered growth of religious conviction of any sort and of every denomination."[21] Notably, these no-aid provisions cannot be dismissed as simply prohibiting preferential funding of churches. A separate "no preference" provision introduced in the 1865

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[21] *Harfst v. Hoegen*, 163 S.W.2d 609, 611-12 (Mo. 1942). *Harfst* was a case involving the funding of religious schools, rather than churches. The Missouri Supreme Court held that the state constitution forbade such funding *despite* the acknowledged significant secular value of the education offered in such schools: "[W]e recognize that the members of these noble teaching orders are inspired only by the most unselfish and highest motives; that parochial education is an embodiment of one of the highest ideals that man may enjoy. The Supreme Court of the United States found that parochial education has been 'long regarded as useful and meritorious.' In the instant case it is admitted by all parties that the Sisters are fully qualified according to the standards set by the superintendent of instruction as teachers of a public school. We know of the great educational institutions conducted by the Jesuits and other Catholic Orders and of their high standards of excellence, St. Louis University being a leader among them." *Harfst*, 163 S.W.2d at 614 (quoting *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925)).

Constitution states: "No preference can ever be given, by law, to any church, sect, or mode of worship."[22]

Neither state history nor the consistent interpretation of these no-aid clauses support the argument that these provisions were the product of any anti-Catholic animus. The no-funding rule was a well-established part of Missouri's constitution – and of the constitutions of many other states – years before Senator Blaine proposed his (unenacted) federal constitutional amendment. Moreover, the no-funding rule has always applied to foreclose direct subsidies to *all* of the churches in Missouri, most of which were (and are) attended by non-Catholic Missourians. Missouri's three constitutional no-aid clauses complement one another, distinctly covering aid to churches separate and apart from aid to religious schools or to clergy.

C. Missouri's implementation of its grant program, consistent with its constitutional ban on direct funding of churches, is a valid exercise of federalism well within a narrow reading of *Locke v. Davey*.

Missouri has implemented a competitive grant program to reimburse a few "qualifying organizations for the purchase of recycled tires to resurface playgrounds, a beneficial reuse of this solid waste." *Trinity*

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[22] Mo. Const. of 1865 art. I, § 11, quoted in 4 Thorpe 2192. This no preference provision remains in the current constitution within article I, section 7.

Lutheran, 788 F.3d at 779. Pursuant to the no-aid provisions in the state constitution, a departmental policy prohibits organizations owned or controlled by a church from participating in the program. The prohibition prevents the state from becoming entangled in religion. It avoids the state having to decide or verify what part of a church's facilities are sufficiently secular and distinct from its religious core or explicit religious activities to qualify for government funding. This policy fits squarely within the zone of permissive separation prohibiting the State from financing a church's capital improvement project. If the provision were not in place, the Federal Establishment Clause would, at a minimum, require Missouri to design the program to include safeguards against state funding of religious activity,[23] thus increasing the opportunity for regulatory interference with how a church wants to use its property to advance its mission. The State is entitled to avoid that kind of entanglement with religion.

As the Eighth Circuit held, Missouri's interest in not funding churches is just as historic and substantial as a state's interest in not funding ministerial training. Petitioner's attempts to reduce *Locke*'s precedential value to the context of such training while creating a federal mandate for state grant programs to include funding for church facilities, should be explicitly

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[23] *Mitchell*, 530 U.S. at 860-67 (upholding program of in-kind aid to religious schools, among others, because it contained constitutionally adequate safeguards against diversion to religious use) (O'Connor, J., joined by Breyer, J., concurring).

rejected. Whether the asserted secular interest is funding higher education or safer playgrounds, the State is entitled to maintain and implement prophylactic rules to avoid funding religion or becoming entangled in it. Petitioner's focus on the scrap material as inherently secular ignores the unique qualities of churches, and Missouri's substantial interest in not funding them.

In *Locke*, this Court upheld a substantially similar state constitutional provision as fitting within federalism's zone of permissive separation, even though the Court recognized that Washington's program would not violate the Federal Establishment Clause. The Court recognized that the Promise Scholarship Program was a voucher program where the "link between government funds and religious training is broken by the independent and private choice of recipients." *Locke*, 540 U.S. at 719. Missouri's scrap tire grant program involves direct funding, thereby more sharply implicating the State's interest in avoiding the funding of religion in a context in which federal constitutional limits may be uncertain. This too makes the instant case even easier than *Locke* for the state to justify its funding limitation.

Petitioner's attempt to cast Missouri's more explicit ban on state funding of religion as unconstitutional discrimination and to limit Chief Justice Rehnquist's opinion in *Locke*, are deeply unpersuasive. Many of the cases relied upon by Petitioner – particularly *McDaniel v. Paty*, 435 U.S. 618 (1978) and *Church of Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520 (1993) – were properly distinguished in *Locke* as involving

coercive limitations on religious freedom. These decisions provide even less support for Petitioner's claim than they did for that of Joshua Davey. This Court's decision in *Locke* firmly supports Missouri's denial of a direct grant to a church to improve its property.

As Chief Justice Rehnquist wrote for the Court in *Locke*, "[T]he State's disfavor of religion (if it can be called that) is of a far milder kind. It imposes neither criminal nor civil sanctions on any type of religious service or rite. It does not deny to ministers the right to participate in the political affairs of the community. . . . The State has merely chosen not to fund a distinct category of instruction." *Id.* at 720-21 (citations omitted). In this case, Missouri certainly does not prevent the Trinity Lutheran Church from building, improving, or operating its facilities consistent with its religious calling. Nor does it prevent the Church from having a playground or a preschool, and operating them consistently with its ministry priorities and community outreach efforts. Missouri is simply refusing to fund a capital improvement project for the Church, consistent with its three bright-line constitutional provisions, which are similar to provisions found in most other states' constitutions as well. It would profoundly upend our constitutional history, state and federal, to require Missouri to fund the improvement of church property.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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